IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 528

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HILTON HOTELS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

(Civil Action No. 65 C 1983)

[Caption Omitted]

DOCKET ENTRIES

(Filed Aug. 22, 1968)

November 29, 1965	Filed Complaint and four copies (JS-5) $15.00
	Filed Designation
	Issued Summons and 5 copies with 5 copies of complaint E
December 7, 1965	Filed 6 affidavits re General Rule 39 (Hilton Hotels Corporation) E
December 28, 1965	Filed summons returned served. $3.00 ht
January 28, 1966	On motion of Government, order time to answer extended to Feb. 4, 1966—Will, J Mld ntcs. 2-1-66 ht
February 3, 1966	Filed Notice of United States
February 3, 1966	Enter Order extending time for the Government to answer to and including February 28, 1966.-Robson, J
	Mld ntcs. 2-4-66 ht
February 28, 1966	Filed Answer ht

March 22, 1966	Enter Order governing procedure prior to trial and setting cause for report on May 18, 1966 at 9:15 a.m. - Draft Robson, J Mailed notices 3-23-66 ht
April 11, 1966	Ordered the following cases be and the same are transferred to Judge Lynch (65 C. 1983), Campbell, C.J., For the Executive Committee (Draft)
May 6, 1966	Filed Interrogatories by defendant to plaintiff ht
May 13, 1966	Filed Stipulation ht
May 18, 1966	Pre-trial conference held and cause continued to September 19, 1966 at 10:00 a.m. for trial. Lynch, J Mailed notices 5-19-66 ht
June 30, 1966	Filed Defendant's Answer to Interrogatories ht
September 19, 1966	By agreement, order cause continued to October 19, 1966 for trial. Lynch, J Mailed notices 9-20-66 ht
October 19, 1966	By agreement cause continued to November 21, 1966 for trial. - Lynch, J Mailed notices 10-19-66 ht
November 21, 1966	By agreement cause continued to Jan. 9, 1967 for trial - Lynch, J Mailed notice 11-23-66 r
January 3, 1967	Order cause continued from January 9, 1967 to January 10, 1967 for trial because Judge Lynch will be holding court in Freeport, Illinois on the 9th. - Lynch, J. Mailed notices 1-3-67 Y

January 10, 1967	Order cause continued to April 17, 1967 at 10 A.M. for trial. Lynch, J. Mailed notices 1-11-67 Y
April 17, 1967	Order cause held on call until April 24, 1967 10 A.M.—Lynch, J. Mailed notices 4-19-67
April 24, 1967	Order cause continued to May 8, 1967 for trial.—Lynch, J. Mailed notices 4-26-67 Y
May 8, 1967	Order cause held on trial call to May 15, 1967 at 10 A.M. - Lynch, J. Mailed notices 5-17-67 Y
June 19, 1967	Order leave to parties to file their stipulation of facts on the remaining unsettled issue by July 31, 1967 and to file their Brief simultaneously within 10 days thereafter. - Lynch, J. Mailed notices 6-20-67
July 31, 1967	Filed Second Stipulation of facts with exhibits "A" and "B" attached EOB
August 10, 1967	Filed Brief of Plaintiff. v
August 11, 1967	Filed brief for the defendant in support of its motion for summary judgment G
January 24, 1968	Filed Memorandum of Decision. (Mailed copy of Memorandum to attorneys of Record 9/24/68) Y
March 27, 1968	Enter judgment for Plaintiff and against defendant in principal amount of $26,654.48, together with $11,031-.68 of deficiency interest paid a total of $37,686.14, this total to bear interest according to law. - Draft - Lynch, J. Mailed notices 3-28-68 (JS-6) Y

May 24, 1968	Filed defendant's notice of Appeal. $5.00 US Mailed copy of notice of appeal to attorney for Plaintiff. Y
May 31, 1968	Filed Appellee's statement. Y
June 26, 1968	Enter order by agreement of the parties and with consent of the court the time in which the United States may docket its record on appeal is extended to and including August 22, 1968. - Lynch, J.
July 30, 1968	Mailed notices 6-27-68 Y Filed Defendant-Appellant's designation of complete record on Appeal. Y

[There are no docket entries in the United States Court of Appeals for the Seventh Circuit.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted]

SECOND STIPULATION

(Filed—July 31, 1967)

The parties, by counsel, stipulate that the following facts may be taken as true for the purposes of this action only. The facts stipulated to herein may be objected to at trial on the grounds of relevancy and materiality, but all other objections are waived.

9. The parties have settled the issue set forth in their original stipulation at paragraph 7(b) concerning depreciation deductions claimed by the plaintiff for the years 1955 and 1956 and plaintiff hereby dismisses its claim on that issue, and that issue alone, with prejudice.

10. Facts concerning the other issue in this case, the plaintiff's claimed deductions for the expenses of legal services which it claims it accrued in 1954, 1955, and 1956, and which were set forth in the parties' original stipulation at paragraph 7(a), are as follows:

11. Plaintiff Hilton Hotels Corporation (hereafter Hilton), a Delaware corporation, in 1949 acquired 43% of the outstanding stock of Hotel Waldorf-Astoria Corporation (hereafter, Waldorf), a New York corporation.

12. Thereafter, as a result of further acquisitions of Waldorf stock, Hilton, as of September 2, 1953, owned 325,370.5 of the 366,040.75 shares of Waldorf which were issued and not retained or held by or for the account of Waldorf.

13. The remaining 40,670.25 shares of Waldorf were owned by shareholders other than Hilton or Waldorf or parties related or connected with Hilton or Waldorf.

14. In August, 1953, Hilton had retained Standard Research Consultants, Inc., of New York City (hereafter, Standard Research), to prepare a merger study for the purpose of determining what would be a fair basis of

merger between Waldorf and Hilton, that is, the number of shares of Hilton to be exchanged in the merger for each of the 40,670.25 shares of Waldorf not held by Hilton or Waldorf.

15. On September 22, 1953, prior to the submission of its final report, Standard Research reported that a fair basis of merger would be an exchange offer of one share of Hilton common for each share of Waldorf common, and stated: "However, because of the problems incident to Hilton's control of Waldorf, together with the obvious advantages of having a wholly-owned property rather than one which has a small minority interest outstanding, we felt that Hilton would be justified in offering 1.25 shares of Hilton stock for each share of Waldorf stock held. This seems to us to be a fair basis of merger for all parties." Similarly, the final report submitted by Standard Research in October, 1953, stated that Hilton would be justified in offering 1.25 shares of Hilton common for each share of Waldorf capital stock and that such an offer would represent a fair basis of merger.

16. On November 12, 1953, an agreement of merger was entered into by Waldorf and Hilton, subject to approval of their respective shareholders as provided by law, which provided, among other things that:

> (a) Hilton shall be the surviving corporation and all of its outstanding stock shall remain outstanding after the effective date of the merger, and
>
> (b) Each share of stock of Waldorf, except shares owned by Waldorf or Hilton, at the time of filing and recording the agreement of merger "shall be converted into one and one-fourth (1¼) shares of common stock of the par value of $5.00 per share of Hilton Hotels Corporation, the Surviving Corporation. The shares of common capital stock of the par value of $1 per share of Hotel Waldorf-Astoria Corporation owned either by Hilton Hotels Corporation or Hotel Waldorf-Astoria Corporation at the time of filing and recording this agreement of merger shall be cancelled and no shares of stock or other securities shall be issued in exchange therefor."

17. On December 8, 1953, Waldorf and Hilton, by mail, notified their stockholders of meetings to be held on December 28 and 29, 1953, respectively, at which meetings the shareholders of each corporation would vote on the proposed merger of Waldorf and Hilton (a consolidation pursuant to Section 91, N.Y. Stock Corporation Law). A copy of Hilton's notice is attached hereto as Exhibit A, less pages F-1 through F-23, and pages 14 through 20 of the Agreement of Merger, which are pages of certification and execution.

18. On December 24, 1953, the holders of 19,771 shares of Waldorf, pursuant to Section 91, N.Y. Stock Corporation Law, filed, with Waldorf, their written objections to the consolidation of Waldorf and Hilton, and demanded payment for their stock; prior to the proposed vote by the shareholders of Waldorf on December 28, 1953, the holders of an additional 450 shares of Waldorf, pursuant to Section 91, N.Y. Stock Corporation Law, filed, with Waldorf, their written objections to the consolidation of Waldorf and Hilton, and demanded payment for their stock.

19. On December 28, 1953, the holders of over two-thirds of the stock of Waldorf, but not the holders of the 20,221 shares objecting, voted in favor of the merger (consolidation) of Hilton and Waldorf, and on December 29, 1953, the holders of over two-thirds of the stock of Hilton voted in favor of the merger (consolidation) of Hilton and Waldorf.

20. On December 31, 1953, the agreement of merger and the certificate of consolidation of Waldorf and Hilton were filed and recorded with the Secretary of the State of New York, pursuant to Section 91, N.Y. Stock Corporation Law.

21. On January 7, 1954, Hilton, by mail, pursuant to Section 21, Subdivision 1, N.Y. Stock Corporation Law, offered to the objecting holders of the 20,221 shares of Waldorf a payment of $24.54 for each share of Waldorf. The offer referred to was rejected by the holders of the 20,221 shares of Waldorf and they began proceeding pursuant to Section 21, N.Y. Stock Corporation Law, on February 11, 1954, in the Supreme Court, in and for the

County of New York, for a determination of the value of their 20,221 shares of Waldorf.

22. Pursuant to the provisions of Section 21, N.Y. Stock Corporation Law, on February 25, 1954, an appraiser, Alfred Ratheim, was appointed by the court to appraise the value of the capital stock of Waldorf as of December 27, 1953; pursuant to Section 21, value is to be determined as of the close of business on the day before the stockholders' vote to which objection has been made.

23. After December 31, 1953, but prior to May, 1954, Hilton asked Standard Research to determine the value of the common stock of Waldorf as of December 27, 1953. This included the preparation of charts and tables supporting its opinion as to that value and the providing of testimony at hearings in the appraisal proceedings in New York before the court appointed appraiser.

24. Hearings were held at New York on May 4, July 19, 20, 21, 27, 28, and 29, and on August 2 and 3, 1954. At those hearings the corporation and the various dissenting stockholders were represented by counsel as follows:

> The corporation appeared by Paul, Weiss, Rifkind, Wharton & Garrison, Esquires, Simon H. Rifkind and Paul J. Newlon, Esquires, of counsel.
>
> Evelyn C. Austin, et al. appeared by Hodges, Reavis, McGrath, Pantaleoni & Downey, Esquires, and Herman W. Finkelstein, Esquire, Martin D. Jacobs, Dennis B. Sullivan and Herman W. Finkelstein, Esquires, of counsel.
>
> Frieda S. Blumenthal and Kate Hurwitz appeared by Morris B. and Daniel W. Blumenthal, Esquires, Daniel W. Blumenthal and Benjamin Hurwitz, Esquires, of counsel.
>
> There was no appearance on behalf of petitioners Reuben Epstein and Mortimer H. Epstein.

1235 pages of testimony were taken, 31 exhibits marked in evidence or for identification on behalf of the corporation, and 24 exhibits marked in evidence or for identification on behalf of the petitioning stockholders.

The corporation called as witnesses: Mr. Joseph Paterson Binns, the Executive Vice-President, General Manager and a Director of Hotel Waldorf-Astoria Corporation; Mr. Gustave Killenberg, a certified public accountant, who was a general partner of the accounting firm of Harris, Kerr, Forster & Co., a firm specializing in hotel accounting, and who was employed by Hotel Waldorf-Astoria Corporation to audit its books; and a Mr. Eugene S. Merrill, Executive Vice-President of Standard Research Consultants.

The petitioners called as witnesses: Mr. Gustav A. Gomprecht, a certified public accountant and a partner in the firm of Main & Co., of New York City; Mr. William MacRossie, an appraiser and a member of the firm of William A. White & Sons, of New York City; Mr. Wallace A. True, real estate and financial advisor to the United Artists Theatre Circuit; and a Mr. Hyman Adelsberg, an appraiser.

After the hearing briefs and reply briefs were submitted on behalf of all parties.

25. The proceedings in the Supreme Court of New York were terminated by an order of that Court on June 14, 1955, which, upon and pursuant to a June 13, 1955 stipulation of settlement and dismissal by and between all of the parties, decreed that Hilton would issue and deliver to each petitioner five-eighths of one share of Hilton common stock for each share of stock of Waldorf held by such petitioner, but without any fractional shares being issued, Hilton to pay $6 for each one-eighth share of Hilton common stock which would otherwise be required to be issued as a fractional share. The Hilton stock was to be issued and delivered against the surrender to Hilton of the certificate or certificates representing the Waldorf stock held by each petitioner, duly endorsed in blank and in proper form for transfer and accompanied by evidence of payment of all requisite stock transfer taxes, if any.

26. The Court approved settlement referred to in paragraph 25 was accomplished in 1955 upon the issuance of 12,621 shares of Hilton common stock and cash payments totalling $822 in lieu of fractional shares, all in

exchange for the 20,221 shares of Waldorf stock held by the dissenters to the merger.

27. In 1954 and 1955, Hilton accrued the following amounts which it paid in connection with the appraisal proceedings under Section 21, Subdivision 1, N.Y. Stock Corporation Law, instituted by the dissenting Waldorf shareholders:

1954:		
Legal services of Paul, Weiss, Rifkind, Wharton and Garrison in the appraisal proceedings	$15,000.00	
Services of Joseph VanGelder and Samuel S. Sklarew as court reporters in appraisal proceedings on July 19-21, July 27-29, and August 2-3, 1954	2,258.62	
		$17,258.62
1955:		
Services of Alfred Ratheim as court appointed appraiser from May 4, 1954 to August 3, 1954	$12,500.00	
Legal services of Paul, Weiss, Rifkind, Wharton and Garrison in the appraisal proceedings	10,000.00	
		$22,500.00

28. In 1956, Hilton accrued $17,500 which it paid to Standard Research on March 20, 1956 for services relating to:

(a) the original report of Standard Research relating to to fair basis of merger submitted in October, 1953, and described in Paragraph 15, and

(b) the services of Standard Research rendered after December 31, 1953, with respect to the appraisal proceeding in New York described in Paragraph 23.

29. As shown in Exhibit B, attached hereto, Standard Research valued its services for its report on the fair basis of merger at $8,289 and its services with respect to the appraisal proceeding at $16,074, and requested payment of a total of $24,363 from Hilton. The amount of this bill was settled for $17,500 by a compromise between Hilton and Standard Research in 1956.

30. The amounts described in paragraphs 27 and 28 were finally determined in the years 1954, 1955, and 1956 as set forth in those paragraphs.

31. Upon decision, the parties will compute the amount of any judgment which may be due, if decision is for the taxpayer. If they are unable to agree on such computation, the matter will be submitted to the Court. If decision is for the defendant, the complaint should be dismissed.

/s/ MILTON A. LEVENFELD
Attorney for Plaintiff

/s/ EDWARD V. HANRAHAN
United States Attorney
Attorney for Defendant

PROXY STATEMENT FOR SPECIAL MEETING OF STOCKHOLDERS

To Be Held on December 29, 1953.

The enclosed proxy is solicited by and on behalf of the management of Hilton Hotels Corporation to be used at a special meeting of stockholders to be held at the offices of the corporation in the Conrad Hilton Hotel, 720 South Michigan Avenue, Chicago, Illinois, on December 29th, 1953, and at any adjournment thereof. All shares represented by proxies will be voted at the meeting. Any stockholder giving a proxy may revoke the same at any time prior to the voting of such proxy.

As of November 16, 1953, the corporation had outstanding (excluding treasury stock) 1,539,815 shares of Common Stock and 25,312 shares of Convertible Preference Stock. The holders of Convertible Preference Stock and Common Stock are entitled to one vote for each share at meetings of the stockholders. The favorable vote of stockholders holding two-thirds of the corporation's outstanding stock is necessary for the adoption of the merger agreement hereinafter referred to. The stock transfer books will not be closed but, as ordered by the Board of Directors, only stockholders of record at the close of business on November 30th, 1953, will be entitled to vote at the meeting.

PROPOSED MERGER WITH HOTEL WALDORF-ASTORIA CORPORATION

Hotel Waldorf-Astoria Corporation, a New York corporation (hereinafter referred to as Waldorf) has leased and operated the Hotel Waldorf-Astoria in New York City since it was erected in 1931. Waldorf is a majority owned subsidiary of Hilton Hotels Corporation (hereinafter referred to as Hilton or as the Corporation). Hilton first acquired an interest in Waldorf on October 14, 1949, when a syndicate in which it participated purchased at $12 per share a closely held block of 249,024 shares of Waldorf's common stock constituting 68% of the 366,040¾ shares outstanding; Hilton participated in the

syndicate to the extent of purchasing 157,325 shares. Since then 168,045½ additional Waldorf shares have been acquired by Hilton as a result of the exercise by Hilton of its options to purchase shares from other syndicate participants at their cost, exchange of Hilton shares for Waldorf shares on a share-for-share basis with syndicate members and other Waldorf stockholders, market purchases and purchases pursuant to an invitation for tenders to all other Waldorf stockholders. As a result, the Corporation now owns a total of 325,370½ shares out of 366,040¾ outstanding shares, or 88.89% of the issue.

It has been the considered judgment of the Directors of the Corporation for some time that ultimately the Hotel Waldorf-Astoria should be integrated into the Hilton system through a fair and equitable merger plan which would finally and definitively settle the relationship of this corporation to the minority interests in Waldorf through a fair stock allocation, thus eliminating an outstanding minority interest in a single hotel property and avoiding any problems with minority interests which might arise or be thought to arise as a result thereof and achieving the economies in administrative, supervisory and corporate expenses and the increased efficiency which will accompany the full integration of the Hotel Waldorf-Astoria into Hilton Hotels Corporation. The Board of Directors of both corporations have given careful consideration to the details of such a merger plan and a fair and equitable basis for the allocation of securities thereunder. An independent firm, Standard Research Consultants, specializing in this field, was retained to make a complete study and investigation into the matter and render a report on a fair and equitable basis for a merger and allocation of securities. After extended review and consideration of the report and other data, the directors of both corporations have approved the merger terms herein set forth and the necessary resolutions to consummate the merger plan have been adopted by both Boards, subject to ratification of the plan and the authorization of its consummation by the stockholders of both corporations, and subject to the discretionary right of the Directors of both corporations to terminate the

merger agreement at any time prior to the effective date of the merger if of the opinion that the merger is in all the circumstances, including dissents filed by the stockholders of either or both corporations, impractical or undesirable. After consideration of the full details of the plan at the special meeting of the stockholders of this corporation convened to consider it, the management will recommend that the stockholders of this corporation ratify and approve the plan and authorize its consummation.

Since Hilton is a Delaware corporation and Waldorf is a New York corporation, the merger plan and all instruments and details in connection with the consummation of it must comply with the requirements of the corporation laws of both States. An immaterial technical difference in terminology exists under the laws of the two states. Under the corporation law of Delaware applicable to Hilton, the proposed transaction is termed a merger, whereas under the law of New York applicable to Waldorf it is technically termed a consolidation under § 91 of the Stock Corporation Law of the State which provides, however, that if one of the constituent companies survives, the transaction is equivalent in legal effect to a merger of such corporations. For convenience of reference and terminology in this Proxy Statement, the proposed transaction is referred to as a merger.

BRIEF SUMMARY OF TERMS OF MERGER

Under the agreement of merger, a copy of which is attached hereto as Exhibit A, all of the assets of Waldorf will be acquired by Hilton and all of its liabilities will be assumed by Hilton. Each share of common stock of Waldorf will be changed into a share and one-quarter of common stock of Hilton, except the shares of common stock of Waldorf held by Hilton on the effective date of the merger which shares will be cancelled. No change will be made in the terms, provisions or rights applicable to the outstanding shares of convertible preference and common stock of Hilton or to any shares of First Preferred Stock of Hilton which may be outstanding on such effective date.

No fractional shares will be deliverable upon consummation of the merger but in lieu thereof the Corporation will issue non-dividend bearing and non-voting scrip. Such scrip will be exchangeable for full common shares when combined with other like scrip on or before December 31, 1955. As soon as practicable thereafter the remaining full shares held for issuance upon surrender of the scrip will be sold in the open market and the proceeds thereof will until December 31, 1959 be distributed pro-rata upon surrender of the remaining scrip certificates.

Since there are outstanding 40,670¼ shares of common stock of Waldorf held by others than Hilton the number of outstanding shares of Hilton will be increased under the one and one-quarter for one conversion ratio to the extent of 50,838 shares. This number may, however, be decreased in view of the rights of dissenting stockholders to have their shares appraised and purchased.

No changes will be made in the charter or by-laws of Hilton which will continue as the charter and by-laws of the surviving corporation. No changes will be made in the officers or directors of Hilton by reason of the merger.

DISCRETIONARY AUTHORITY

The merger agreement may be terminated and, in such event, shall become void and of no effect in the event the Board of Directors of Hilton or Waldorf at any time prior to the effective date of the merger is of the opinion that the merger is, under all the circumstances, including the dissents filed by the stockholders of either Hilton or Waldorf, impracticable or undesirable.

LISTING AND REGISTRATION

The outstanding Common Stock of Hilton is listed on the New York Stock Exchange, Los Angeles Stock Exchange and San Francisco Stock Exchange and is registered under the Securities and Exchange Act of 1934. Application will be made for such listings and registration of the additional shares of Common Stock of Hilton issueable under the merger agreement.

TAX STATUS OF THE MERGER

Both Hilton and Waldorf have been advised by their respective counsel that in their opinion, under the applicable provisions of the Internal Revenue Code now in effect, no taxable gain or loss will be realized by stockholders of either Hilton or Waldorf as a result of the merger except in the case of such stockholders who have objected to the merger and are paid the value of their stock in proceedings pursuant to applicable state law.

The companies have been advised that the basis of the Hilton common stock in the hands of former holders of Waldorf stock will be the same as the cost or other basis of the Waldorf stock surrendered in exchange therefor.

RIGHTS AND REMEDIES OF DISSENTING STOCKHOLDERS

As to Hilton

Hilton is a Delaware corporation. Section 61 of the General Corporation Law of the State of Delaware provides, among other things, that the corporation surviving a merger shall within ten days after the date on which the agreement of merger has been filed and recorded, notify each stockholder of a merging Delaware corporation, at his last known address as appears on the books of the corporation, who objected to the merger in writing and whose shares were not voted in favor of such merger and who filed such written objections with the corporation before the taking of the vote on such merger, that the agreement of merger has been filed and recorded; and if any such stockholder shall within twenty days after the date of mailing of said notice demand in writing from the resulting corporation payment of his stock, then the resulting corporation shall, within thirty days after the expiration of such period of twenty days, pay to him the value of his stock on the date of the recording of the merger agreement, exclusive of any element of value arising from the expectation or accomplishment of such merger; and if during such thirty-day period the resulting corporation and such stockholders shall fail to agree as to the value of such stock, any such stockholder or

the resulting corporation may, by a petition filed in the Delaware Court of Chancery within four months after the expiration of said thirty-day period, demand a determination of the value of the stock of all such stockholders by an appraiser to be appointed by such Court. Voting against, or a direction in a proxy to vote against, the adoption of the agreement of merger will not constitute an objection in writing under the purview of said Section 61.

As to Waldorf

Waldorf is a New York corporation. Section 91 of the New York Stock Corporation Law provides that any stockholder of Waldorf not voting in favor of the merger may object to the merger and demand payment for his stock at any time prior to the vote. The objection and demand must be in writing and filed with Waldorf. The objecting stockholder of Waldorf shall have the right to have such stock appraised and paid for in the manner provided and subject to the conditions imposed in Section 21 of the New York Stock Corporation Law. In general said Section 21 provides that within ten days after the vote is taken the surviving corporation shall make a written offer personally or by registered mail to each objecting stockholder to pay for his stock at a price deemed by the surviving corporation to be the value thereof. If the surviving corporation fails to make an offer within the specified time or if the objecting stockholder fails to accept such offer within 20 days after the mailing or delivery thereof, either the surviving corporation or the stockholder may petition the Supreme Court of New York County to determine the value of the stock, such petition to be returnable on the fiftieth day after a vote is taken. The Court will then proceed to determine the value of the stock or appoint an appraiser to do so. In the latter event the appraiser will take testimony and file a report giving conclusions as to the value of the stock and the reasons therefor which the Court may confirm, reject or modify. The surviving corporation will then be required to purchase the shares at the price determined upon. Voting against, or a di-

rection in a proxy to vote against, the proposal to approve the merger agreement will not constitute an objection in writing as required by said Section 91.

THE MANAGEMENT RECOMMENDS THAT THE STOCKHOLDERS VOTE TO APPROVE THE MERGER.

GENERAL

The cost of preparing and mailing the notice of the meeting, proxy statement and form of proxy will be paid by Hilton. In addition to mailing copies of this material to all stockholders, Hilton will request banks and brokers to forward copies of such material to persons for whom they hold stock of Hilton and to request authority for execution of the proxies. Hilton will reimburse such banks and brokers for their out-of-pocket expenses incurred in connection therewith, which out-of-pocket expenses it is estimated will not exceed $250.

If matters other than those for which authority is herein sought should arise at the meeting, it is intended that the shares represented by the proxies will be voted in the discretion of the persons named therein. The management has no knowledge of any other matters that may be presented to the meeting.

All valid proxies which may be received will be voted unless previously revoked and, if specification is made upon any proposition to be voted upon as set forth therein, in accordance with such specification.

The Proxy Statement includes the financial statements listed on page F-1. The statements of both Hilton and Waldorf at December 31, 1952, are audited and certified by independent public accountants. The statements as of September 30, 1953, are based upon unaudited figures of the companies.

Additional financial statements of Hilton and Waldorf are on file with the Securities and Exchange Commission, Washington, D. C., and with the New York Stock Exchange and, in the case of Waldorf, with the American Stock Exchange.

By order of the Board of Directors.
WILLIAM J. FRIEDMAN
Secretary.

AGREEMENT OF MERGER

Pursuant to Section 252 of the General Corporation Law of the State of Delaware

Between

HILTON HOTELS CORPORATION

and

HOTEL WALDORF-ASTORIA CORPORATION

AGREEMENT OF MERGER dated as of the 12th day of November, 1953, made by and between HILTON HOTELS CORPORATION and its Board of Directors, party of the first part, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and HOTEL WALDORF-ASTORIA CORPORATION and its Board of Directors, party of the second part, a corporation organized and existing under and by virtue of the laws of the State of New York,

WITNESSETH, That:

WHEREAS, the two corporations deem it advisable that Hilton Hotels Corporation, party of the first part, merge into itself Hotel Waldorf-Astoria Corporation, party of the second part, and Hotel Waldorf-Astoria Corporation, party of the second part, should be merged into Hilton Hotels Corporation, party of the first part, and that said corporations should be consolidated with each other so as to form a single corporation which shall be Hilton Hotels Corporation, as authorized under and pursuant to the terms and conditions hereinafter set forth; and

WHEREAS, said Hilton Hotels Corporation has been duly organized under and by virtue of the General Corporation Law of the State of Delaware pursuant to an Agreement of Consolidation which was filed in the office of the Secretary of State on May 29, 1946, and a certified copy thereof recorded in the office of the Recorder of Deeds for the County of New Castle, State of Delaware, on May 29, 1946, and was authorized to do busi-

ness in the State of New York by certificate of authority issued on May 31, 1946 by the Department of State of the State of New York; and

WHEREAS, Hilton Hotels Corporation has an authorized capital consisting of 4,446,495.03 shares, of which 100,000 shares are First Preferred Stock of the par value of $100 per share, 346,495.03 shares are Convertible Preference Stock of the par value of $50 per share, and 4,000,000 shares are Common Stock of the par value of $5 per share, and has now outstanding 213,426 shares of 4% Convertible Preference Stock and 1,755,807 shares of Common Stock (the term "outstanding", as used in this instrument, to include shares of any corporation held in its own treasury); and

WHEREAS, the said Hotel Waldorf-Astoria Corporation has heretofore been duly organized under and by virtue of the Stock Corporation Law of the State of New York, the certificate of incorporation of which was filed in the Department of State of the State of New York on May 28, 1929; and

WHEREAS, said Hotel Waldorf-Astoria Corporation has an authorized capital consisting of 386,380 shares of common capital stock of the par value of $1 per share, of which 366,380 shares are now outstanding; and

WHEREAS, the principal office of Hilton Hotels Corporation is located at 129 South State Street in the City of Dover, County of Kent, State of Delaware, and the name and address of its registered agent is United States Corporation Company, 129 South State Street, Dover, Delaware; and the principal office of Hotel Waldorf-Astoria Corporation is located at the Hotel Waldorf-Astoria, 49th Street and Park Avenue, Borough of Manhattan, City, County and State of New York.

Now, THEREFORE, the corporations, parties to this Agreement of Merger, by and between their respective Boards of Directors, have agreed and hereby agree, each with the other, that Hotel Waldorf-Astoria Corporation, party of the second part, be merged with and into Hilton

Hotels Corporation, party of the first part, and that said corporations be consolidated with each other so as to form a single corporation which shall be Hilton Hotels Corporation, pursuant to the laws of the States of Delaware and New York and do hereby agree upon and prescribe the terms and conditions of said merger and consolidation (hereinafter referred to as the "merger") and carry the same into effect, as follows:

FIRST: Hilton Hotels Corporation, party of the first part, merges into itself Hotel Waldorf-Astoria Corporation, party of the second part, and Hotel Waldorf-Astoria Corporation shall be and hereby is merged into Hilton Hotels Corporation, and said corporations, the party of the first part and the party of the second part are hereby consolidated with each other so as to form a single corporation which shall be Hilton Hotels Corporation, it being the intention of the parties that the said Hilton Hotels Corporation shall continue as the surviving corporation and retain its corporate existence as prior to the merger.

SECOND: Upon this merger becoming effective, the separate existence of Hotel Waldorf-Astoria Corporation shall cease and Hilton Hotels Corporation, into and with which Hotel Waldorf-Astoria Corporation shall have been merged as provided herein, shall continue to exist as the surviving corporation (herein called "Surviving Corporation"), and without further action shall possess all the rights, privileges, powers and franchises of a public as well as of a private nature, and shall be subject to all the restrictions, disabilities and duties of each of the constituent corporations to this merger, and all property, real, personal and mixed, and all debts due to each of said constituent corporations, for whatever account, whether for stock subscriptions or otherwise, as well as all other things and actions belonging or accruing to each of said constituent corporations shall be vested in Hilton Hotels Corporation, the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest, shall be thereafter as effectually the property of Hilton Hotels Corporation, the

Surviving Corporation, as they were of said constituent corporations; and the title to any real estate, whether by deed or otherwise vested in either of said constituent corporations, shall not revert or be impaired by reason of this merger; provided that all rights of creditors and all liens upon the property of either of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of Hotel Waldorf-Astoria Corporation shall thenceforth attach to Hilton Hotels Corporation, the Surviving Corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

Pursuant to Section ninety-one of the Stock Corporation Law of the State of New York, Hilton Hotels Corporation hereby agrees that it may be sued in the State of New York for any obligation of Hotel Waldorf-Astoria Corporation and hereby irrevocably appoints the Secretary of State of the State of New York as its agent to accept service of process in an action for the enforcement of payment of such obligations.

THIRD: The terms and provisions of the Agreement of Consolidation of Hilton Hotels Corporation referred to in the preambles hereof, as amended subsequent to the filing and recording thereof, shall constitute the charter and the certificate of incorporation of Hilton Hotels Corporation, the Surviving Corporation, and the terms and provisions thereof are hereby incorporated herein with the same force and effect as though herein set forth in full, and from and after the effective date of this agreement of merger and until amended as provided by law, said Agreement of Consolidation, as amended subsequent to the filing and recording thereof, separate and apart from this agreement of merger, may be separately certified as the charter of Hilton Hotels Corporation, the Surviving Corporation. In addition to the powers conferred upon it by statute, Hilton Hotels Corporation, the Surviving Corporation, shall have the powers set forth in, and except as otherwise provided by law, shall be governed by said Agreement of Consolidation.

FOURTH: The mode of carrying into effect the merger provided for in this agreement of merger and the manner and basis of converting the shares of the constituent

(Duplicate)

corporations into shares of the Surviving Corporation, shall be as follows:

(a) Each issued and outstanding share of 4% Convertible Preference Stock and of Common Stock of Hilton Hotels Corporation, and if any shares of First Preferred Stock of Hilton Hotels Corporation shall be issued after the date hereof and shall be outstanding at the time of filing and recording this agreement of merger, shall remain outstanding, and each issued and outstanding share of common capital stock of the par value of $1 per share of Hotel Waldorf-Astoria Corporation, except such shares owned either by Hilton Hotels Corporation or Hotel Waldorf-Astoria Corporation at the time of filing and recording this agreement of merger, shall be converted into one and one-fourth (1¼) shares of Common Stock of the par value of $5 per share of Hilton Hotels Corporation, the Surviving Corporation. The shares of common capital stock of the par value of $1 per share of Hotel Waldorf-Astoria Corporation owned either by Hilton Hotels Corporation or Hotel Waldorf-Astoria Corporation at the time of filing and recording this agreement of merger shall be cancelled and no shares of stock or other securities shall be issued in exchange therefor.

No fractional shares of Common Stock of Hilton Hotels Corporation shall be issued or become issuable hereunder, and the holders of common capital stock of Hotel Waldorf-Astoria Corporation shall not be or become entitled to any fractional shares of Common Stock of Hilton Hotels Corporation by reason of the conversion referred to above. If rights to fractions of a share of Common Stock of Hilton Hotels Corporation would result from such conversion, Hilton Hotels Corporation shall, for and in lieu of each such fraction of a share, issue and deliver

to the holder entitled thereto, a scrip certificate for such fraction of a share of Common Stock of Hilton Hotels Corporation, which scrip certificate, when surrendered on or before December 31, 1955, together with one or more other scrip certificates for a fraction or fractions of a share of Common Stock of Hilton Hotels Corporation, (similarly exchangeable at the time of surrender) and equal in the aggregate to one or more full share or shares of such Common Stock, shall entitle the bearer to receive from Hilton Hotels Corporation in exchange therefor (i) a certificate or certificates for Common Stock of Hilton Hotels Corporation for the full share or shares represented in the aggregate by such surrendered scrip certificates, and (ii) a new scrip certificate for any fraction of a share of such Common Stock, as the case may be, in excess of the number of whole shares of such stock specified by the scrip certificates so surrendered. Such scrip certificate shall not entitle any bearer thereof to any dividend or voting rights or any other powers or rights of a stockholder of Hilton Hotels Corporation, all holders of such scrip certificates being hereby limited to such powers and rights only as are by this paragraph expressly conferred. All rights in and under such scrip certificates shall be vested solely in the bearers of such scrip certificates and shall pass by delivery thereof, and Hilton Hotels Corporation shall be entitled to treat each bearer of a scrip certificate as the owner thereof for all purposes and shall be unaffected by any notice to the contrary. The issue and delivery by Hilton Hotels Corporation to the bearers of such certificates of one or more stock certificates and a scrip certificate for any excess fraction of a share, pursuant to the terms and conditions in this paragraph set forth, shall constitute a full and complete discharge of all liability of Hilton Hotels Corporation under such a scrip certificate, and, by receiving and accepting any such scrip certificate or scrip certificates, each successive bearer thereof consents to and shall be bound by the terms and conditions

contained in this paragraph, which shall be set forth in or on the back of said scrip certificates. The Board of Directors of the Hilton Hotels Corporation is hereby authorized to make and enforce any and all such regulations, not inconsistent herewith, governing the issue and manner of surrender and exchange of scrip certificates hereunder, as such Board of Directors in its discretion may deem advisable. All shares of Common Stock issued pursuant to the provisions of this paragraph shall be fully paid and non-assessable. Each and all of such scrip certificates shall not be exchangeable for shares of Common Stock unless surrendered for exchange as in this paragraph provided on or before December 31, 1955. As soon as practicable after December 31, 1955, the remaining full shares held for issuance upon surrender of scrip certificates on or before December 31, 1955, will be sold in the open market and the proceeds will, until December 31, 1959, be distributed pro rata upon surrender of unexchanged scrip certificates. After December 31, 1959, the holders of unexchanged scrip certificates shall not be entitled to any pro rata distribution of such proceeds, and such scrip certificates shall become and be void and of no value. Any proceeds resulting from such sale, not claimed on or prior to December 31, 1959, shall be held by Hilton Hotels Corporation as part of its general funds free of any claims of holders of scrip certificates.

(b) After the effective date of merger, each owner, except Hilton Hotels Corporation and Hotel Waldorf-Astoria Corporation, of an outstanding certificate representing shares of common capital stock of Hotel Waldorf-Astoria Corporation shall be entitled, upon surrendering such certificate or certificates to Hilton Hotels Corporation, the Surviving Corporation, to receive in exchange therefor a certificate or certificates representing the shares of Common Stock of Hilton Hotels Corporation, the Surviving Corporation, into which the shares of stock theretofore represented by the surrendered certificate or certifi-

cates shall have been converted, and a scrip certificate for fractional shares, if any, as hereinabove in paragraph (a) of this clause Fourth provided. Until such surrender and exchange, no stockholder shall, however, be entitled to dividends upon or to vote the shares of Common Stock of Hilton Hotels Corporation, the Surviving Corporation, to which he is entitled as a result of the merger. Upon such surrender and exchange, all dividends declared on the Common Stock of Hilton Hotels Corporation, the Surviving Corporation, after the effective date of the merger and before the issuance of the new certificates for shares of Common Stock of Hilton Hotels Corporation, the Surviving Corporation, so issued in exchange, will be paid upon the issuance of such new certificates.

FIFTH: The by-laws of Hilton Hotels Corporation, as amended, will remain its by-laws, except to the extent that such by-laws may be inconsistent with this agreement of merger, and except as otherwise provided by law; and until altered, amended or repealed as in said by-laws provided, Hilton Hotels Corporation, the Surviving Corporation, shall be governed by the provisions thereof.

SIXTH: The number of directors of Hilton Hotels Corporation, the Surviving Corporation, shall be ten (10) until such time as a different number may be fixed by the by-laws, and such number may be altered from time to time as may be provided therein. The names and post-office addresses of the members of the first Board of Directors of Hilton Hotels Corporation, the Surviving Corporation, who shall hold office from and after the effective date of the merger until the first annual meeting of the stockholders of Hilton Hotels Corporation, the Surviving Corporation, thereafter, and until their successors shall be elected and shall have qualified according to the by-laws of Hilton Hotels Corporation, the Surviving Corporation, are as follows:

Name	Postoffice Address
CONRAD N. HILTON	9970 Santa Monica Blvd. Beverly Hills, California
HENRY CROWN	300 W. Washington St. Chicago 3, Illinois
SPEARL ELLISON	2223 El Cajon Blvd. San Diego, California
Y. FRANK FREEMAN	5451 Marathon St. Hollywood 38, California
WILLARD W. KEITH	714 W. Olympic Blvd. Los Angeles 15, California
ROBERT P. WILLIFORD	720 S. Michigan Blvd. Chicago 5, Illinois
SAM D. YOUNG	El Paso National Bank El Paso, Texas
LAWRENCE STERN	33 N. LaSalle St. Chicago 2, Illinois
CHARLES DEERE WIMAN	1325 Third Avenue Moline, Illinois
JOSEPH P. BINNS	The Waldorf-Astoria New York 22, New York

The names and postoffice addresses of the first officers of Hilton Hotels Corporation, the Surviving Corporation, who shall hold office from and after the effective date of the merger until the first meeting of the newly elected Board of Directors following the first annual meeting of the stockholders of Hilton Hotels Corporation, the Surviving Corporation, thereafter and until their respective successors shall have been elected and shall have qualified according to the by-laws of Hilton Hotels Corporation, the Surviving Corporation, are as follows:

Title	Name	Postoffice Address
President	Conrad N. Hilton	9970 Santa Monica Blvd. Beverly Hills, California
Executive Vice President	Robert P. Williford	720 S. Michigan Blvd. Chicago 5, Illinois
Vice President	Henry Crown	300 W. Washington St. Chicago 3, Illinois
Vice President	Spearl Ellison	2223 El Cajon Blvd. San Diego, California
Vice President	Joseph P. Binns	The Waldorf-Astoria New York 22, New York
Vice President	Charles L. Fletcher	720 S. Michigan Blvd. Chicago 5, Illinois
Vice President and Assistant Secretary	Lynn H. Montjoy	9970 Santa Monica Blvd. Beverly Hills, California
Secretary	William J. Friedman	208 S. LaSalle Street Chicago 4, Illinois
Treasurer and Comptroller	Herbert E. Holt	720 S. Michigan Blvd. Chicago 5, Illinois
Assistant Secretary	Joseph T. Zoline	208 S. LaSalle St. Chicago 4, Illinois
Assistant Secretary	Olive M. Wakeman	9970 Santa Monica Blvd. Beverly Hills, California
Assistant Secretary	Charles Hammer	720 S. Michigan Blvd. Chicago 5, Illinois
Assistant Secretary	J. J. Walsh	The Plaza Hotel New York 19, New York
Assistant Secretary	Fletcher Brumit	The Dayton Biltmore Dayton 2, Ohio
Assistant Secretary	C. J. Mack	The Mayflower Hotel Washington, D. C.
Assistant Secretary	Joseph A. Harper	Hotel Jefferson St. Louis, Missouri
Assistant Secretary	Maurice Rosenfield	208 S. LaSalle St. Chicago 4, Illinois
Assistant Secretary	Truett Gore	The Deshler-Hilton Columbus, Ohio

SEVENTH: The capital of Hilton Hotels Corporation, the Surviving Corporation, shall be an amount equal to the aggregate par value of all the issued shares of all

classes of its stock after giving effect to the terms and provisions of this agreement of merger. The earned surplus of Hilton Hotels Corporation plus the earned surplus of Hotel Waldorf-Astoria Corporation, except that proportion thereof accrued to the shares of stock of said corporation acquired by Hilton Hotels Corporation prior to the respective dates of acquisition of such shares, decreased by an amount equal to the excess of (a) the aggregate par value of the issued shares of all classes of stock of Hilton Hotels Corporation, the Surviving Corporation, after giving effect to the terms and provisions of this agreement of merger, over (b) the aggregate par value of the shares of stock of all classes of Hilton Hotels Corporation and Hotel Waldorf-Astoria Corporation now issued and outstanding, shall be, and shall in all respects be treated as and dealt with as earned surplus of Hilton Hotels Corporation, the Surviving Corporation.

EIGHTH: Hilton Hotels Corporation, the Surviving Corporation, shall pay all expenses of carrying this agreement of merger into effect and accomplishing the merger herein provided for.

NINTH: If at any time Hilton Hotels Corporation, the Surviving Corporation, shall consider or be advised that any further assignment or assurances in law are necessary or desirable to vest in said Surviving Corporation according to the terms hereof, the title to any property or rights of Hotel Waldorf-Astoria Corporation, the proper officers and directors of Hotel Waldorf-Astoria Corporation shall and will execute and make all proper assignments and assurances in law, and do all things necessary or proper to vest title to such property or rights in Hilton Hotels Corporation, the Surviving Corporation, and otherwise to carry out the purposes of this agreement of merger.

TENTH: The principal office of Hilton Hotels Corporation, the Surviving Corporation, will be located at 129 South State Street in the City of Dover, County of Kent, State of Delaware, and the United States Corporation Company will be the registered agent of Hilton Hotels Corporation, the Surviving Corporation, located at 129 South State Street, Dover, Delaware.

ELEVENTH: Hilton Hotels Corporation, the Surviving Corporation, hereby reserves the right to amend, alter, change or repeal its Certificate of Incorporation in the manner now or hereafter prescribed by statute, and all rights or powers conferred in such Certificate of Incorporation upon stockholders, directors and officers and on the corporation are subject to this reservation.

TWELFTH: This agreement of merger shall be submitted to each of said constituent corporations as provided by the laws of the States of Delaware and New York, and this agreement of merger shall take effect and shall be deemed and taken to be the agreement and act of merger of said corporations upon the adoption thereof by the vote by ballot, in person or by proxy, of the stockholders of each such corporation representing two-thirds of the total number of shares of its capital stock, in accordance with the requirements of the General Corporation Law of the State of Delaware, and the Stock Corporation Law of the State of New York, at a meeting of the stockholders of each of said corporations, separately called and held for the purpose of considering and voting for the adoption or rejection of this agreement of merger, and upon the doing of such other acts and things as shall be required for accomplishing the merger by the applicable provisions of said laws, provided, however, that anything herein contained to the contrary notwithstanding, this agreement of merger may be terminated by the Board of Directors of Hilton Hotels Corporation or by the Board of Directors of Hotel Waldorf-Astoria Corporation at any time prior to the effective date of the merger if either of said Boards is of the opinion that the merger is in all the circumstances, including the dissents filed by the stockholders of either or both Hilton Hotels Corporation and Hotel Waldorf-Astoria Corporation, impracticable or undesirable.

In compliance with legal requirements of the State of New York, Hotel Waldorf-Astoria Corporation and Hilton Hotels Corporation will execute and file a Certificate of Consolidation which is substantially identical with the provisions of this Agreement of Merger, except that to comply with the requirements of New York law, the

transaction is referred to as a consolidation rather than as a merger.

In the event that this agreement of merger is not adopted by the stockholders of either or both of the constituent corporations, parties hereto, in the manner specified above, or in the event of the termination by the Board of Directors of either party hereto as above provided, notice shall forthwith be given to the other party and thereupon this agreement shall become wholly void and of no effect, and there shall be no liability on the part of either party hereto or its Board of Directors or stockholders. Notwithstanding that the merger herein and the conversion of shares of the constituent corporations into shares of Hilton Hotels Corporation, the Surviving Corporation, shall occur only upon the taking of the action referred to in the next preceeding paragraph, nevertheless, whether or not such action is accomplished by December 31, 1953, for convenience in adjusting the accounts of the constituent corporations and of Hilton Hotels Corporation, the Surviving Corporation, said date of December 31, 1953, shall be deemed the date as of which the rights, privileges, powers and franchises of each of the constituent corporations and all property, real, personal and mixed, and all debts due to each of said constituent corporations, shall be vested in Hilton Hotels Corporation, the Surviving Corporation, and as of which all debts, liabilities and duties of the constituent corporations shall attach to Hilton Hotels Corporation, the Surviving Corporation, and all operations of each constituent corporation, subsequent to December 31, 1953, shall be for the account of Hilton Hotels Corporation, the Surviving Corporation.

IN WITNESS WHEREOF, a majority of the Board of Directors of each of said constituent corporations have signed this agreement of merger in its behalf and in their own behalf as such directors, and such corporations have caused these presents to be signed in their behalf by their respective Presidents or Vice-Presidents and have caused their respective corporate seals to be hereunto affixed and attested by their respective Secretaries or Assistant Secretaries, all as of the day and year first above written.

A majority of the Board of Directors of Hilton Hotels Corporation

HILTON HOTELS CORPORATION

By .....
CONRAD N. HILTON, President

Attest:

.....
WILLIAM J. FRIEDMAN, Secretary

A majority of the Board of Directors of Hotel Waldorf-Astoria Corporation

HOTEL WALDORF-ASTORIA CORPORATION

By .....
JOSEPH P. BINNS,
Executive Vice President

Attest:

.....
FRANCIS T. DE VINCENT, Assistant Secretary

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Caption Omitted]

MEMORANDUM OF DECISION

(Filed—January 24, 1968)

One of the two issues in this case has been settled. Remaining for decision in this case is the plaintiff's claim for deductions for certain legal services accrued in 1954, 1955, and 1956.

The facts concerning the disputed issue are contained in the parties' second stipulation and are adopted by this court as its findings of fact.

It is clear to this court—and taxpayer now concedes in its brief—that the taxpayer is not entitled to a deduction for that portion of the 1956 payment to Standard Research which was for services by Standard Research in determining a fair basis of merger between Waldorf and Hilton. (Paragraphs 14 and 15 of the second stipulation.) Expenses incurred in reorganizing or recapitalizing a corporation are not deductible as ordinary and necessary business expenses. General Bancshares Corp. v. CIR, 326 F2d 712 (8th Cir., 1964); Gravois Planning Mill Company v. CIR 299 F2d 199 (8th Cir., 1962); Missouri-Kansas Pipe Line Co. v. Commissioner, 148 F2d 460, 462 (3 Cir., 1945).

The only issue therefore is whether those expenses incurred by the taxpayer in connection with the appraisal proceeding are deductible.

In reaching a decision the court must consider the primary purpose of the expenditures involved, and deductibility must not be denied merely because a question of title to property is incidentally involved. Rassenfoss v. Commissioner, 158 F2d 764, (7th Cir., 1966).

Under Section 91(9) of the New York Stock Corporation Law the merger became effective when the Certificate of Consolidation was filed in the office of the Secretary of State. Section 91 provides that the objecting shareholders shall have the right to have their stock appraised

and paid for in the manner provided, and subject to the conditions imposed by Section 21 of the New York Stock Corporation Law.

Section 21(6) provides:

> "Any stockholder demanding payment for his stock shall have no right to receive any dividends or distributions payable to holders of such stock of record after the close of business on the day next preceding the date of the stockholders' vote in favor of the action to which such objection was made, and upon such vote shall cease to have any other rights as a stockholder of the corporation in respect to such stock, except the right to receive payment for the value thereof as in this section provided . . ."

Section 21(7) provides that if the objecting stockholder demands payment as a result of action taken pursuant to Section 91, then:

> ". . . the shares or other securities of the resulting or surviving corporation into which the shares of the objecting stockholder would have been converted had no objection been made shall, unless the certificate of merger or consolidation shall otherwise provide, be deemed to have been duly issued in accordance with the terms of such certificate and reacquired by the resulting or surviving corporation, and may be held or disposed of by it free of any preemptive rights of stockholders."

This court agrees with the reasoning expressed in Smith Hotel Enterprises, Inc. v. Nelson, 236 F. Supp. 303, (D.C.E.D. Wisconsin, 1964) wherein Judge Grubb held, in an analogous situation, that the taxpayer was entitled to a deduction. In that case the corporation received an offer to purchase substantially all of its assets. At a stockholders meeting, two of the three stockholders voted to accept the offer, but the third dissented and demanded payment from the corporation of the fair value of her shares pursuant to the Wisconsin statutes setting out the rights of dissenting shareholders in the event of the sale of all or substantially all of the prop-

erty and assets of a corporation. The fair value of the shares was determined by the Circuit Court of Milwaukee, and the corporation deducted its legal and other expenses incurred in connection with the litigation. The District Director of Internal Revenue disallowed the deduction on the grounds that the expenses incurred in the litigation were capital expenditures made for the acquisition of the shares owned by the dissenting shareholder.

The United States District Court in the Smith case held the expenses deductible as ordinary and necessary business expenses. Judge Grubb noted that under the Wisconsin law the corporation was required to purchase the stock of the dissenting shareholder and that the only purpose of the action in Circuit Court was to determine the fair value of the shares.

The opinion in the Smith case stated:

> ". . . it appears that the primary purpose of the state litigation in the instant case was a determination of the fair value of the shares, and the involvement of title was incidental. The deduction made by the taxpayer was proper as an ordinary and necessary business expense."

Under the New York law the objecting stockholders in the case before this court had no interest other than to receive payment for their stock. The only purpose of the appraisal proceeding was to determine the price the dissenting stockholders were to be paid. The merger was already effective and the expenses incurred by the corporation in the appraisal proceeding were not reorganization expenses. It would not be proper to deny deductibility on the basis that the appraisal expenditures might have been foreseen as one of the consequences of the merger, any more than it would be proper to deny deductibility to expenses incurred in changing Hilton's advertising brochures to include the Waldorf-Astoria Hotel.

For the reasons stated herein the court is of the opinion that the plaintiff should prevail on the issue now being considered.

The court notes that there is some dispute remaining between the parties as to what portion of the $17,500

payment to Standard Research was in connection with services relating to the fair basis of the merger, and what portion was in connection with services relating to the appraisal proceeding. The former expenses are not deductible; the latter are.

As stated in the second stipulation, the parties will compute the amount of any judgment which may be due. When the parties have reached agreement an appropriate judgment order should be submitted to the court. If the parties are unable to agree as to what portion of the payment to Standard Research is deductible, the issue may then be submitted to the court for determination.

/s/ WILLIAM J. LYNCH
Judge, United States District Court

Dated: Jan. 24, 1968

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted]

JUDGMENT ORDER

Pursuant to this Court's Memorandum of Decision it is ordered that judgment in this cause be entered in favor of the plaintiff and against the defendant in the principal amount of $26,654.48 of federal income taxes paid, together with $11,031.68 of deficiency interest paid, all in the total amount of $37,686.16, this total amount to bear interest according to law. Section 6611(b)(2), Internal Revenue Code of 1954.

/s/ W. J. LYNCH
Judge, United States District Court

Dated: March 27, 1968

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IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968—JANUARY SESSION, 1969

No. 17124

HILTON HOTELS CORPORATION, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

April 15, 1969

Before HASTINGS, Senior Circuit Judge, and KILEY and KERNER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* The United States appeals from a district court decision in a refund suit brought by taxpayer Hilton Hotels Corporation (Hilton). The sole issue raised by this appeal [1] is whether the district court erred, as the Government contends, in holding that expenditures incurred by Hilton in connection with an appraisal proceeding to value the stock of dissenting shareholders in a merged corporation are currently deductible ordinary and necessary business expenses. The Government urges that such expenditures are nondeductible capital outlays.

The relevant facts were stipulated by the parties and adopted by the lower court. They may be summarized in the following manner.

On September 2, 1953, Hilton owned 325,370.5 of the 366,040.75 issued shares of the Hotel Waldorf-Astoria

[1] One of the two issues originally presented in this case was settled by the parties.

Corporation (Waldorf); the remaining 40,670.25 shares of Waldorf were owned by shareholders other than Hilton or Waldorf.

Contemplating a merger, Hilton retained Standard Research Consultants, Inc. (Standard) to prepare a merger study to determine a fair basis of exchange of Hilton stock for the remaining 40,670.25 shares of Waldorf. Standard concluded that a fair exchange ratio would be 1.25 shares of Hilton common stock for each remaining share of Waldorf stock.

On November 12, 1953, Hilton and Waldorf entered into an agreement of merger which provided that Hilton would be the surviving corporation and that 1.25 of Hilton's shares would be offered for each of the remaining 40,670.25 shares of Waldorf.

The holders of over two-thirds of the stock of Hilton and Waldorf voted in favor of the merger on December 28 and 29, 1953. Prior to this vote of approval, however, the holders of 20,221 shares of Waldorf filed with Waldorf, pursuant to § 91 of the New York Stock Corporation Law,[2] their written objections to the proposed merger and demanded payment for their stock.

On December 31, 1953, the merger agreement and the certificate of consolidation were filed and recorded with the Secretary of State of New York in accordance with the relevant provisions of § 91. Thereafter and pursuant to § 21, Subdivision 1, of the New York Stock Corporation Law[3], Hilton offered to the objecting holders of the

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[2] Section 91 reads in relevant part:

"7. Any stockholder * * * included in such consolidation, not voting in favor thereof, may object * * * and demand payment for his stock, at any time prior to the vote * * * The objecting stockholder or the corporation shall have the right to have such stock appraised and paid for in the manner provided, and subject to the conditions imposed by section twenty-one. * * *."

[3] Section 21 reads in relevant part:

"1. In the event that the stockholders of a corporation have taken action pursuant to [section] * * * ninety-one * * * and if any stockholder has objected to such action and demanded payment for his stock as provided in * * * section ninety-one * * * the corporation, * * *, shall mail * * * to such objecting

Waldorf stock a payment of $24.54 for each share of the remaining 20,221 shares. The Hilton offer was rejected, and on February 11, 1954, pursuant to § 21 [4], the dissenting holders commenced appraisal proceedings in the Supreme Court for the County of New York to determine the value of their shares of Waldorf. These proceedings continued until June 14, 1955, when the New York court approved the parties' settlement of the valuation dispute and ordered the appraisal proceedings terminated.

This suit presents the problem of characterizing for the purpose of taxation the nature of the expenses incurred by Hilton in connection with the appraisal proceeding.

It is axiomatic that if the Hilton expenditures are deemed to have been incurred, as the Government urges, in corporate reorganization or recapitalization they are not deductible. *General Bancshares Corp.* v. *C.I.R.*, 8 Cir., 326 F. 2d 712, 715, *cert. denied*, 379 U.S. 832 (1964) and cases cited therein. It is equally true, however, that if such expenditures are held to be ordinary and necessary business expenses they are deductible. Int. Rev. Code of 1954, § 162.

The line of demarcation between the deductible and the nondeductible expenditure is frequently difficult to perceive because the "* * * decisive distinctions [between the two] are those of degree and not of kind." *Welch* v. *Helvering*, 290 U.S. 111, 114 (1933). The applicable rule generally held to govern in such situations is the *primary purpose* test. *Rassenfoss* v. *Commissioner of In-*

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stockholder * * * a written offer to pay for such stock in cash at a price deemed by the corporation to be the value thereof; * * *."

[4] Section 21 reads in relevant part:

"3. If the corporation shall fail to make an offer within the time specified in subdivision one hereof, or if the objecting stockholder shall fail to accept an offer from the corporation within twenty days after the mailing * * *, either such stockholder or the corporation may petition the supreme court, at any special term thereof held within the judicial district in which the principal office of the corporation is situated, to determine the value of such stock."

ternal Revenue, 7 Cir., 158 F. 2d 764, 767 (1946); *Manufacturers Hanover Trust Co.* v. *United States*, U. S. Ct. Cl., 312 F. 2d 785, 789, *cert. denied*, 375 U.S. 880 (1963).

In the instant case, we are satisfied the district court appropriately considered and applied the primary purpose doctrine and affirm its decision which held that the Hilton expenditures, arising out of the appraisal proceedings, were deductible as ordinary and necessary business expenses. *Hilton Hotels* v. *United States*, D.C. N.D. Ill., 285 F. Supp. 617 (1968).

In reaching its decision, the district court found that the Hilton-Waldorf merger became effective under New York law upon filing the Certificate of Consolidation with the Secretary of State.[5] It further found under New York law that the objecting Waldorf holders had no interest other than to receive payment of the fair value of their stock[6] and that the *sole purpose* of the appraisal proceedings was to determine the fair value of the objecting holders' shares in Waldorf. As a result of such findings, the court concluded that the expenses experienced by Hilton in connection with such proceedings were not capital in nature and were therefore deductible as ordinary and necessary business expenses. We agree.

Like the district court, we feel that the rationale of *Smith Hotel Enterprises, Inc.* v. *Nelson*, D.C.E.D. Wisc.,

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[5] Section 91 of the New York Stock Corporation Law reads in material part:

> "9. The consolidation authorized by the provisions of this section shall become effective for all purposes of the laws of this state upon filing in the office of the secretary of state the certificate [of consolidation] * * *."

[6] Section 21 of the New York Stock Corporation Law provides:

> "6. Any stockholder demanding payment for his stock shall have no right to receive any dividends or distribution payable to holders of such stock of record after the close of business on the day next preceding the date of the stockholders' vote in favor of the action to which such objection was made, and upon such vote shall cease to have any other rights of a stockholder of the corporation in respect to such stock, *except the right to receive payment for the value thereof* * * *." [Emphasis supplied.]

236 F. Supp. 303 (1964) is germane to the instant case. In *Smith*, the corporate taxpayer received an offer to purchase substantially all its assets. One shareholder objected to the offer and pursuant to the controlling state statute demanded from the corporation payment of the fair value of her shares. Failing to reach an agreement with the corporation as to the value of her shares, the dissenting shareholder petitioned the appropriate state court to determine their fair value. The taxpayer deducted, as an ordinary and necessary business expense, the expenditures it incurred in the state court valuation proceeding. The court upheld the deductibility of these expenditures upon concluding that "* * * the primary purpose of the state litigation * * * was a determination of the fair value of the shares * * *," and that the taxpayer's primary purpose in the state litigation was to keep its liability to a minimum. 236 F. Supp. *supra* at 305-306.

Upon considering the objectives of the appraisal proceeding in this case, the expenses incurred by Hilton in connection therewith should not be characterized as being capital in nature. It is apparent the proceeding was not necessary to the consummation of the merger nor did it function primarily to permit the acquisition of the objecting holders' shares. Rather, as in the *Smith* case, the paramount purpose of the appraisal proceeding was to determine the fair value of the dissenting stockholders' share in Waldorf.

Our conclusion in this case obviously is a narrow one related specifically to a factual situation controlled by New York statutes. In general, authorities cited by the Government concern circumstances distinguishable on their facts from the case at bar.

The judgment of the district court is affirmed.

A true Copy: AFFIRMED.

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Tuesday, April 15, 1969

[Caption Omitted]

Before HON. JOHN S. HASTINGS, *Senior Circuit Judge*, HON. ROGER J. KILEY, *Circuit Judge*, HON. OTTO KERNER, *Circuit Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

SUPREME COURT OF THE UNITED STATES
No. 528, October Term, 1969

UNITED STATES, PETITIONER

v.

HILTON HOTELS CORPORATION

ORDER ALLOWING CERTIORARI—Filed December 8, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 412.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 373037 422